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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Railroad cars connect by coupling devices, which consist of a knuckle attached to a drawbar at each end of every railroad car. Drawbars are designed to couple automatically if properly aligned. The Safety Appliance Act, 45 U.S.C. §2, makes it unlawful for railroads to use cars which cannot be coupled and uncoupled automatically without the necessity of men going between the cars to perform the coupling. The law does not specifically address the aligning or centering of a drawbar preparatory to coupling. Drawbars, by design, move from side to side to allow movement of cars around curves. This movement frequently results in the drawbar being off-center, thereby preventing a coupling with another car until the drawbar is centered. Although some state and federal courts have held that the realignment of drawbars is a *per se* violation of the Safety Appliance Act, other courts, including the Fifth and Third Circuits, have held that the Safety Appliance Act is not automatically violated by this everyday railroad operation. The question presented is:

Does Section 2 of the Safety Appliance Act impose absolute liability on a railroad whenever a worker aligns a non-defective drawbar before a coupling takes place?

STATEMENT REQUIRED BY RULE 29.1

Frank J. Eschberger is the respondent/plaintiff.

The petitioner/defendant Consolidated Rail Corporation has the following subsidiaries and affiliates:

CRR Industries, Inc.

CRC Properties, Inc.

Akron & Barberton Belt RR. Co.

Pitts., Chart. & Yough. Rwy. Co.

Indiana Harbor Belt RR. Co.

Albany Port Railroad Corp.

Railroad Assoc. Insurance, Ltd.

Calumet Western Railway Co.

Lakefront Dock & RR. Term. Co.

Transportation Data Xchge., Inc.

Merchants Desp. Trans. Corp.

Mich. Fay., & Greenb. RR. Co.

Trailer Train Co.

Monongahela Railway Co.

Peoria & Pekin Union Rwy. Co.

Calpro Company

St. Lawrence & Adiron Rwy. Co.

Peoria Midwest Transp. Corp.

Railbox Company

Belt Railway Co. of Chicago

Penn Central Communications Co.

Railgon Company

Chicago & Western Indiana Rwy. Co.

CRR Credit Corp.

CRR Investments, Inc.

PD Land Services, Inc.

CG Products, Inc.

Conrail Mercury, Inc.

Concord Resources Group, Inc.

CG Lockport

CU Energy Partnership LP

General American Insurance Co.

Concord Canada, Inc.

Land Acquisition Services, Inc.

CR Quality Services, Inc.

Soretox, Inc.

NY Land Acquisition Services, Inc.

Stablex Canada, Inc.

Stablex Filtration, Inc.

Black Hawk Development, Inc.

Incinerator Proj. Joint Venture

TABLE OF CONTENTS.

	Page
Question Presented	i
Statement Required by Rule 29.1	iii
Table of Authorities	vii
Opinions Below	2
Jurisdictional Statement	3
Statutory Provisions Involved	4
Statement of the Case	10
Reasons for Issuing the Writ	10
Preliminary Statement	10
The Appellate Division's decision is contrary to *Reed, Maldonado; c.f., Lewis* and imposes unwarranted liability on railroads where there is no defect in their equipment	11
This case presents a serious issue regarding the operations of railroads across the country which requires this Court's guidance	18
Conclusion	21

Page

Appendix:

Order Modifying Judgment Entered June 7, 1991..... 1a
Memorandum Decision Entered June 7, 1991..... 3a
Order Denying Motion for Leave to Appeal to the Court of Appeals Entered October 4, 1991..... 6a
Order Denying Motion for Leave to Appeal to the Court of Appeals Dated December 23, 1991.... 8a
Order Denying Defendant's Post-Trial Motions and Granting Plaintiff's Cross-Motion Dated June 8, 1990 and Granted September 4, 1990 .. 10a
Judgment Appealed From..... 13a
Bill of Costs Annexed to Judgment..... 15a
Trial Exhibit No. 13..... 18a
Trial Exhibit No. 8..... 18a
Federal Register, Vol. 48, No. 193, October 4, 1983—Proposed Rules, Pages 45272-45274..... 19a
Federal Register, Vol. 49, No. 36, February 22, 1984—Rules and Regulations, Pages 6495-6497 .. 30a
Conrail Safety Rule 1711..... 40a

Page

TABLE OF AUTHORITIES.

Affolder v. New York, Chicago & St. Louis Railroad Co., 339 U.S. 96 (1950) 12,13,15,16,21
Carter v. Atlanta & St. Andrews Bay Ry. Co., 338 U.S. 430 (1949) 12
Clark v. Kentucky and Ind. Terminal R.R., 728 F.2d 307 (6th Cir. 1984) 13
Cobb v. Union Ry., 318 F.2d 33 (6th Cir. 1963), *cert. denied*, 375 U.S. 945 13
Crane v. Cedar Rapids & I.C.R.R., 395 U.S. 164 (1969) 6
Leveck v. Consolidated Rail Corp., 148 Ill. App.3d 118, 498 N.E.2d 529 (1986) 9,13
Maldonado v. Missouri Pac. Ry. Co., 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) ..... *passim*
Metcalfe v. Atchison, T. & S.F. Ry., 491 F.2d 892 (10th Cir. 1974) 9,15
Plouffe v. Burlington N., 224 Mont. 467, 730 P.2d 1148 (1986) 9,13
Reed v. Philadelphia, Bethlehem & New England R.R. Co., 939 F.2d 128 (3d Cir. 1991) ..... *passim*
Schaaf v. Chesapeake & Ohio Ry., 113 Mich. App. 544 (Mich. Ct. App. 1982); *cert. denied*, 464 U.S. 848 (1983) 13
United Transp. Union v. Lewis, 711 F.2d 233 (D.C. Cir. 1983) ..... *passim*
Urie v. Thompson, 337 U.S. 163 (1949) 6

Page

STATUTES.

28 U.S.C. §1257 3
Federal Employers Liability Act, 45 U.S.C. §51 *et seq.* 4,6
Safety Appliance Act:
42 U.S.C. §2 (1991) ..... *passim*
45 U.S.C. §16 6

RULES.

Federal Railroad Administration:
49 U.S.C. §103(a) 6
49 C.F.R. Part 218 6
49 C.F.R. Part 218.30 14
49 C.F.R. Part 218.31 19

OTHER AUTHORITIES.

24 Cong. Rec. 1280 (1893) 11
24 Cong. Rec. 1367 12
48 Fed. Reg. 45272 5,14
48 Fed. Reg. 45272-74 6
48 Fed. Reg. 452723 (1983) 14
49 Fed. Reg. 6495 (1984) 14
H.R. Rep. No. 1678, 52nd Cong., 1st Sess. §3 (1892) 11
S. Rep. No. 1049, 52nd Cong., 1st Sess. 75 (1892) 11

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

Petitioner Consolidated Rail Corporation respectfully prays that a writ of certiorari issue to review the order and opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department, entered in this case on June 7, 1991.

OPINIONS BELOW

The opinion of the Appellate Division of the New York Supreme Court is reported at _____ A.D.2d _____, 572 N.Y.S.2d 539 (4th Dept. 1991) and is reprinted in the Appendix to this petition at 3a.

JURISDICTIONAL STATEMENT

The opinion and order of the Appellate Division was entered on June 7, 1991. The Appellate Division denied a motion for reargument or permission to appeal to the New York Court of Appeals on October 4, 1991 (A. 6a). A motion for permission to appeal to the Court of Appeals was made to the New York Court of Appeals and was denied on December 23, 1991 (A. 8a). Thus, the Appellate Division's decision was rendered by the highest court of the state in which review could be had and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

This action was brought pursuant to the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, but involves the interpretation and application of the Safety Appliance Act ("SAA"), 45 U.S.C. §2 (1991) which provides:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

STATEMENT OF THE CASE

On August 6, 1983, Respondent was working as a railroad trainsman at one of Conrail's switching, or classification, yards in Buffalo, New York, one of more than 4,000 such yards in the United States,[1] where incoming freight cars are sorted and combined into outgoing trains. In order to combine the trains, cars are directed down specific tracks to be coupled to other cars on those tracks. This process typically requires the cars, while uncoupled at one or both ends, to travel to some extent over curved track. One of Respondent's regular jobs, which he had done "thousands of times", was to manually center the automatic coupling equipment located at the end of railroad freight cars. The standard coupler consists of a "knuckle" attached to a "drawbar." (See A. 18a; [photographs]). The drawbar is that part of the coupling device that is attached to the car which allows the coupler to move laterally so that the train can negotiate the curve of the track. If the drawbar were fixed and not capable of side to side movement, trains could travel only in straight lines. The knuckle is at the end of the drawbar and in order to couple two freight cars together, the drawbars must be aligned and at least one of the two knuckles must be open.

Conrail employees are required to follow a Conrail safety rule, in effect when Respondent was injured, specifying the procedures to be followed before an employee aligns a drawbar. This rule provides that, before an employee goes between standing (non-moving) cars, the cars must be separated by at least thirty feet and the track must be "protected," namely, shut down so that there is no movement of cars on the track while the employee is centering the drawbar (A. 40a).

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[1] 48 Fed. Reg. 45272.

The Conrail Safety Rule provides the same procedure mandated by the agency responsible for administering the Safety Appliance Act, the Federal Railroad Administration ("FRA")[2] which adopted a similar rule in 1984 applicable to all railroads. 49 C.F.R. Part 218. The FRA Rule was proposed jointly by the American Association of Railroads and the United Transportation Union, the union which represents the trainmen who couple railroad cars. The rule anticipates that trainmen, in the normal course of their operations, will go between cars which are not moving and are on protected tracks to manually adjust drawbars. 48 Fed. Reg. 45272-74 (October 4, 1983) (A. 19a).

Respondent sued Conrail in the New York Supreme Court, Erie County, under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51 alleging negligence and a violation of Section 2 of the SAA.[3] He testified at trial that he followed the Conrail Safety Rule by separating the cars by more than thirty feet and by calling the tower to shut down the track. Then, with the car stationary and separated by more than thirty feet from any other railroad car,[4] on a track protected against any car movement, he manually moved the drawbar to the center position, following which he directed his engineer to push the cars together and an automatic coupling was made. He testified that he injured his back in the course

[2] The FRA is an administration in the Department of Transportation. The Administration carries out all railroad safety laws in the United States. 49 U.S.C. §103(a).

[3] Although the SAA itself provides only for enforcement of Section 2 by civil penalty actions (45 U.S.C. §16), the FELA has been construed as providing a cause of action without negligence, based on a violation of the SAA. *E.g., Crane v. Cedar Rapids & I.C.R.R.*, 395 U.S. 164, 166 (1969); *see Urie v. Thompson*, 337 U.S. 163, 188-89 (1949).

[4] In fact, Respondent testified that the car on which he was aligning the drawbar was separated from any other equipment on either side by at least fifty feet.

of moving the drawbar. Other than moving the drawbar, Respondent had no contact with a railroad car. In other words, he was injured because he moved the drawbar, not because he was between cars.

Respondent also testified that there was no defect in the equipment and that he reported no defect, as he would have been required to do under Conrail's safety rules. Additionally, at trial, he called two railroad witnesses to describe the movement of cars around curves in the Frontier Yard, and the fact that this movement causes the drawbar to hang more towards the outside of the curve, thus affecting the alignment of the coupler and its ability to couple with another car.

At the close of proof the trial court ruled that Respondent had not introduced evidence of any negligence on the part of Conrail and dismissed his FELA negligence claim. However, the trial court denied Conrail's motion made at the close of Respondent's case to dismiss his cause of action under the Safety Appliance Act.[5] Further, despite requests by Conrail for such an

[5] THE COURT: There's one matter that's been pending before the Court, and that is the motion by the Defendant made at the close of Plaintiff's case to dismiss the cause of action as pled under the Safety Appliance Act, and I reserved decision. I—we had marked Defendant's Exhibit M, which was the memorandum of law in support of that motion, and we heard—we heard extensive argument in that regard. I've carefully reviewed my notes relative to the—to the oral argument. I also have reviewed the Defendant's memo, and particularly studied over the case which the Defendant's memo, and particularly studied over the case which the Defendants urged on the Court, which is Maldonado, M-a-l-d-o-n-a-d-o, versus Missouri Pacific Railway Company, it's 798 Federal Reporter 2d 764, and it's a case out of the United States Court of Appeals for the Fifth Circuit. I have—I relied upon that case, and I have also read the Plaintiff's case offered in response, which is Schaaf, S-c-h-a-a-f, versus Chesapeake and Ohio Railroad Company. Interestingly enough, referred to in Maldonado. And that's—the cite I have is 37 Northwest—I'm sorry, 317 Northwest 2nd 679, and that's out of the Court of Appeals of Michigan. And concluding my research, the Defendant's motion is in all respects denied R. 2409-10.

instruction, the trial court refused to instruct the jury in accordance with *Maldonado v. Missouri Pac. Ry. Co.*, 798 F.2d 764, 768 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), that the mere fact that the railroad aligned a non-defective drawbar, in and of itself, does not establish a violation of the SAA.[6] The jury returned a verdict for Respondent of $5,437,000.

On Conrail's appeal, the New York Supreme Court, Appellate Division, Fourth Department, affirmed the judgment of liability,[7] and sustained the trial court's refusal to dismiss the cause of action based on the Safety

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[6] THE COURT: Now [Defendant's Request to Charge] twenty-eight, if the Court does not dismiss the Safety Appliance Act, and I did not, so the following instructions are requested.

(a) If the coupler on the railroad lumber car failed to couple automatically at any time because it was not properly set or aligned for coupling, such failure is not a violation of the Safety Appliance Act, and

(b) The mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. If you find that the drawbar was out of line by reason of the car having come around a curve or that it was otherwise not defective, it must be found that it was properly set so that it could couple. If it was not adjusted and aligned as automatic couplers must be in order to function properly, the failure to automatically couple at any point in the prior movement of the car would not be a violation of the Safety Appliance Act.

I—I gather—I gather, Mr. Griffin, that that—what you're requesting is basically in keeping with your motion and the Maldonado versus Missouri Pacific Railroad case. Is that substantially correct?

MR. GRIFFIN: That's true, Your Honor.

. . .

THE COURT: I'm going to decline to charge as requested in twenty-eight. R. 2488-2497.

[7] The Appellate Division reduced the verdict to $3,005,000 (A. 3a-5a).

Appliance Act and its rejection of a charge based on *Maldonado*. The Court recognized that there was a split in decisions on the point, but followed a line of cases[8] described as holding "that the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad," regardless of whether there is a defect in the equipment (A. 3a).[9] Conrail moved for reargument, citing, *inter alia*, the intervening Third Circuit decision in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 131 (3d Cir. 1991), which noted the same split in decisions and further observed that the issue had not yet been "definitely resolved by the Supreme Court," but adopted the *Maldonado* conclusion that the SAA is not violated by the alignment of a non-defective drawbar. The Appellate Division, Fourth Department, denied reargument and leave to appeal to the New York Court of Appeals (A. 6a); the New York Court of Appeals also denied Conrail's motion for permission to appeal (A. 8a).

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[8] *Metcalfe v. Atchison, T. & S.F. Ry.*, 491 F.2d 892 (10th Cir. 1974); *Leveck v. Consolidated Rail Corp.*, 148 Ill. App.3d 118, 498 N.E.2d 529 (1986); *Plouffe v. Burlington N.*, 224 Mont. 467, 730 P.2d 1148 (1986).

[9] In dicta, the court observed that Conrail had not met its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (A. 4a). However, this gratuitous observation overlooked Respondent's own testimony and the testimony of Respondent's witness (*see* p. 7, *supra*).

REASONS FOR ISSUING THE WRIT

Preliminary Statement

The decision of the New York Appellate Division widens the split of authorities on this issue of substantial importance to Conrail and railroads nationwide. It is directly contrary to the Court of Appeals decisions in *Reed, supra*, and *Maldonado, supra; c.f. United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983). The decision has the effect of subjecting a railroad to liability for violating the Safety Appliance Act every time one of its employees aligns a non-defective, standard drawbar, a job performed countless times daily in railroad yards across the country. As the *Reed* court recognized, there is "no device [that] has yet been put into wide-spread use that would automatically align the drawbar." 939 F.2d at 130. Thus, the decision imposes unwarranted liability on railroads where there is no defect in their equipment. A writ of certiorari should be granted in order to clarify the present state of the law with regard to the Federal Safety Appliance Act.

THE APPELLATE DIVISION'S DECISION IS CONTRARY TO *REED, MALDONADO; C.F., LEWIS* AND IMPOSES UNWARRANTED LIABILITY ON RAILROADS WHERE THERE IS NO DEFECT IN THEIR EQUIPMENT.

Congress enacted Section 2 of the SAA in 1893 to remedy many injuries resulting from the use of the link and pin coupler equipment which required that a brakeman stand between moving cars and direct the link of one coupler into the mouth of the other coupler while the cars were moving together.[10] Section 2 of the statute prohibits railroads from using cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars." 45 U.S.C. §2. The legislative history reveals that this provision was designed to address the hazardous situation described as follows:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

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[10] H.R. Rep. No. 1678, 52nd Cong., 1st Sess. §3 (1892); S. Rep. No. 1049, 52nd Cong., 1st Sess. 75 (1892).

Thus, Section 2 of the Safety Appliance Act governs the dangerous *act of actually coupling* the cars, *not* the *preparation* for coupling the cars. Specifically, the statute does not prohibit men from going between cars which are standing still in order to prepare the knuckles and drawbars for couplings, as was the situation in this case.

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.

This Court has long recognized that non-defective, perfectly operating automated couplers may not couple unless certain steps are taken to position the equipment in advance of coupling. In *Affolder v. New York, Chicago & St. Louis Railroad Co.*, 339 U.S. 96, 99 (1950), this Court concluded that under the SAA a coupler was defective if it failed to couple after it "was placed in a position to operate on impact." The *Affolder* Court, therefore, concluded that liability under the SAA depended upon "whether, after the couplers were placed in open or proper position, they failed to couple automatically on impact." *Id.*

In the instant case, Respondent was placing the drawbar, in the words of *Affolder*, in "proper position" to facilitate the very purpose of the Act—automatic coupling.[11] Although this Court recognized in *Affolder*

[11] Just prior to the *Affolder* holding, this court in *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949), held that a defective coupler was one which failed to couple "*if the coupler was properly set* and failed to couple on the occasion in question." (Emphasis added). Similarly, the Sixth Circuit has held that it "was

(Footnote continued on following page.)

that the railroad could assert the defense that both knuckles were closed, whether there is a "misaligned drawbar" defense is an issue that has divided the federal and state courts since *Affolder,* and is presented here. One line of cases, consisting primarily of state court decisions, has given Section 2 of the SAA a broad, operations-oriented interpretation to maximize railroad liability for workers injured in connection with any efforts to align a drawbar.[12] Cases in this line have extended liability "even though the plaintiff's injuries were not caused by the coming together of the cars but simply by the strain of aligning the coupler." *Clark v. Kentucky and Ind. Terminal R.R.,* 728 F.2d 307, 312 (6th Cir. 1984).

The other line of cases, exemplified by recent federal appellate decisions, has recognized a "misaligned drawbar" defense. *E.g., Maldonado,* 798 F.2d at 767; *Reed,* 939 F.2d at 132. Both decisions build on the careful analysis of the history and purpose of Section 2 set forth in *United Transp. Union v. Lewis, supra* which sustained the FRA's interpretation of Section 2 as not prohibiting the use of couplers that required a worker to place an arm between the cars. In *Lewis,* 711 F.2d at 245, the District of Columbia Circuit noted the "practical consequences" of a contrary

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(Footnote continued from preceding page.)

an accurate statement of law" to charge a jury in a SAA case "that if they found that the couplers failed to couple automatically because they were not properly set that such a failure would not be a violation of the Act." *Cobb v. Union Ry.,* 318 F.2d 33, 37 (6th Cir. 1963), *cert. denied,* 375 U.S. 945.

[12] See *e.g., Schaaf v. Chesapeake & Ohio Ry.,* 113 Mich. App. 544 (Mich. Ct. App. 1982); *cert. denied,* 464 (U.S. 848 (1983); *Leveck v. Consolidated Rail Corp., supra; Plouffe v. Burlington Northern, supra.*

interpretation: "if the statute is read as a blanket prohibition against going between cars during coupling operations, it would make licit coupling an impossibility." After close review of the statute and its history the D.C. Circuit concluded that Section 2 addressed equipment, and "does not address operating procedures." *Id.* at 245 n.31.

Lewis concerned decisions of the FRA permitting use of "out hooks" to open the knuckles when cars are uncoupled, a task requiring the worker to put his arm between the cars. *Id.* at 236-237. As noted, the court sustained the FRA's interpretation of Section 2 as not resulting in a violation any time a worker had to put part of his body between two cars.

Shortly after *Lewis* was decided, the FRA adopted a rule, similar to the one Conrail had previously adopted, specifying the procedures to be followed to avoid unanticipated movement of cars when a railroad yard employee places himself between cars "to adjust a coupling device,"[13] an interpretation of Section 2 that does not view the existence of a misaligned drawbar as a *per se* violation.

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[13] 49 C.F.R. Part 218.30. The FRA rule requires each railroad to have a rule, like Conrail's Rule, requiring that both cars be stopped (and under Conrail's rule at least 30 feet apart) before the worker goes between the cars. The rule applies only to "hump" yards, like the one where Respondent worked, where incoming cars are separated at a slight hump in the track and then move by gravity, controlled by speed retarders and switches, to the appropriate track where the outgoing train is being made up. *See* 49 F.R. 6495 (1984) (A. 30a). As the FRA explained when it proposed the rule, it would apply when workers had to go between cars when "adjusting coupling devices," including "adjusting drawbars." 48 F.R. 45272, 45273 (1983) (A. 19a, 24a).

In *Lewis* the D.C. Circuit had no need to determine the implications of its affirmance of the FRA's equipment-oriented reading of Section 2 on the misaligned drawbar defense issue.[14]

In *Maldonado, supra,* dealing with issues factually similar to the case at bar, the Fifth Circuit directly addressed the issue as to whether a misaligned drawbar is a *per se* violation of the SAA. After analyzing *Lewis* and this Court's decision in *Affolder,* the Fifth Circuit set forth a proper interpretation of the Safety Appliance Act when it stated "that drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the non-coupling does not reflect defective or failed equipment." *Id.* at 768.[15]

Recently, the United States Court of Appeals for the Third Circuit in *Reed,* after carefully reviewing *Affolder, Lewis, Maldonado,* and the conflicting case law, held:

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[14] Although the question was not before it in that case, the court stated its understanding that, under the caselaw to that point, actual failure to couple because of a misaligned drawbar or a closed coupler was sufficient to satisfy section 2 (*Lewis,* 711 F.2d at 251 n.39), a view that is contrary to *Affolder.* However, earlier in the opinion the court observed:

> That the knuckle on the coupler closes or that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is 'defective.' To be effective the coupling apparatus must permit limited lateral movement of the drawbar in order to allow the cars, when coupled together, to pass around curves without derailment and to allow coupling on a curve. Occasionally, drawbars move so far out of alignment as to preclude automatic coupling. It then becomes necessary to adjust the drawbar or the coupling knuckle, and this may require going between the cars. *Metcalfe v. Atchison, Topeka & Sante Fe Ry.,* 491 F.2d 892, 896 (10th Cir. 1974). After 90 years automatic ***realigning*** devices, as opposed to automatic ***coupling*** devices, are still in the experimental stage and have been installed on less than one percent of railroad cars. *Id.* at 896 n.2 (emphasis supplied). *Lewis,* 711 F.2d at 235 n.5.

[15] In that case, however, there was no evidence of the cause of the misalignment and so the trial court was upheld. *Id.* at 768.

carefully reviewing *Affolder*, *Lewis*, *Maldonado*, and the conflicting case law, held:

> We think the rationale of *Affolder*, which allows a defense of closed knuckles, applies equally to a situation where non-defective equipment is misaligned. In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act.

Reed, 939 F.2d at 132. The *Reed* Court further held that "the defendant must present evidence to show that the misalignment did not occur because of equipment failure" and concluded:

> We therefore reject plaintiff's contention that the mere failure to couple establishes a *per se* violation of the Safety Appliance Act and forecloses a defense by the railroad.

Id. at 132.[16]

[16] As stated above, there is dicta in the Appellate Division's memorandum decision in this case that, in any event, "Defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect." (A. 4a). Moreover, the only evidence of the cause of the misalignment was that the car went around a curve and Respondent unequivocally stated that the equipment was not defective. As noted, he called witnesses who testified as to the effect of the curve in the Frontier Yard on drawbar alignment. Petitioner was entitled to rely on this other evidence and had no affirmative obligation to present other witnesses or evidence on this point. This was an issue which should have been left to the jury, but the trial court refused to charge the jury in accordance with *Maldonado*. Similarly, in *Reed*, the defendant introduced no evidence of the cause of the failure to couple but instead relied on the plaintiff's proof on that issue. Despite the lack of affirmative proof by the defendant in *Reed*, the proof adduced by *Reed* led the court to determine that the SAA had not been violated. Thus, Conrail was entitled in this case to a jury instruction based on the "Maldonado defense."

The Appellate Division's holding in this case that "the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad" is directly contrary to *Reed* and other recent federal court decisions on this recurring issue of federal law, and those are the better-reasoned decisions, based as they are on an interpretation of the statute that is well-grounded in its language, history, and administrative interpretation.

THIS CASE PRESENTS A SERIOUS ISSUE REGARDING THE OPERATIONS OF RAILROADS ACROSS THE COUNTRY WHICH REQUIRES THIS COURT'S GUIDANCE.

In *Lewis,* 711 F.2d at 245, the District of Columbia Circuit Court of Appeals recognized the dramatic impact of a ruling which would create a *per se* violation of the Safety Appliance Act whenever a trainman went between cars as a part of the coupling procedure:

> If the statute is read as a blanket prohibition against going between cars during coupling operations, it would make licit coupling an impossibility. In the last step of the coupling process, men must go between the rails to couple hoses for the air brakes. Appellants' construction would effectively prohibit the performance of this everyday operation because generally it cannot be accomplished from outside the **rails**, much less from outside the cars. Congress could not possibly have intended such a result, as it was the 1893 Act itself which initiated the requirement that cars be equipped with air brakes. *See* 27 Stat. 531 (1893), codified at 45 U.S.C. §9; *United States v. Chesapeake & Ohio Ry.*, 247 F. 49, 50-51 (4th Cir. 1917) (Emphasis supplied) (footnotes omitted).

As the *Lewis* court concluded, "nothing in the plain language [of the Safety Appliance Act] suggests an intent to impose an independent prohibition against procedures that require men to go between cars." *Id.* at 243. Indeed, in addition to coupling railroad operations, such as operating handbrakes, replacing airhose gaskets and turning anglecocks can only be done from between the ends of railroad cars.

Thus, the *Lewis* court recognized that there is no absolute prohibition against railroad workers going in between cars during the coupling process. Yet, under the

rationale of the decision below and its forebears, the critical fact establishing liability is that, to adjust a coupler, the worker had to place a part of his body in the airspace between two cars to some extent. That is dispositive even though, as here, the couplers were not defective, the cars were immobilized fifty feet apart, and the injury has nothing to do with the fact that part of his body entered that airspace or even that there was a second car nearby.

As was stated above, the FRA has, by adopting regulations which specifically govern the act of aligning drawbars on standing, separated cars, given its implicit approval of the type of work being performed by Respondent in this case. Yet, the decision of the Appellate Division has the effect of penalizing Conrail for performing procedures consistent with the FRA Rule and which have been sanctioned under *Maldonado* and *Reed*.[17] Further, the substantial, adverse impact of this decision, both on Conrail and on railroads nationwide, is completely inconsistent with Congressional intent in 1893 in enacting the Safety Appliance Act.

Because this case squarely presents a conflict among the courts (both federal and state) on a recurring and important issue of federal law, the Court should grant this petition. Not only is there an existing circuit split on the proper interpretation of the Safety Appliance Act, but there is also a split between state and federal authorities. The impact of the resulting confusion and uncertainty on the railroad industry is significant.

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[17] In fact, the FRA imposes civil penalties for failing to comply with its operating rule. 49 C.F.R. Part 218.41; yet, the Appellate Division's decision has the effect of penalizing the railroad for the very conduct that the rule contemplates.

Conrail currently operates on a system-wide basis in 14 states, the District of Columbia, and one province in Canada, with approximately 26,000 employees, 5,292 of which are trainmen whose duties include the coupling of railroad cars. In New York, Conrail has fifteen major yards and many smaller ones where cars are coupled on a regular basis; it has well over a hundred such yards in other states. Thus, the decision below, coupled with the recent Courts of Appeals' decisions, has a significant impact on Conrail's operations by subjecting it to conflicting standards of liability for events which occur countless times every day in its many yards.

CONCLUSION

This case presents an important issue of federal law which has not been, but should be, settled by this Court. The Court should grant this petition in order to resolve the conflict in the courts regarding the meaning of Section 2 of the SAA and to provide the railroads and lower courts, once and for all, with a definitive ruling on the applicability of the Act to the railroad's daily operations. As the Court in *Reed* stated:

> In short, *Affolder* put the closed knuckles controversy to rest, but the other common cause of failed coupling, drawbar misalignment, has not been definitively resolved by the Supreme Court. Perhaps not surprisingly, the Court of Appeals and various state courts have differed in their approach to this question.

939 F.2d. at 131.

Petitioner respectfully submits that now is the time for this Court to definitively resolve this question.

Respectfully submitted,

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Attorneys for Petitioner
Consolidated Rail Corporation

March 3, 1992

APPENDIX

Order Modifying Judgment Entered June 7, 1991

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CALLAHAN, *J.P.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

The above named Consolidated Rail Corporation having appealed to this court from the judgment of the Supreme Court, entered in the Erie County Clerk's Office on June 27, 1990, and said appeal having been argued by Richard Griffin of counsel for appellant, Paul Beltz of counsel for respondent, and submitted by Charles Clarke for the Association of American Railroads, Amicus Curiae, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously reversed on the law and facts without costs and a new trial is granted on the issue of damages only unless

plaintiff, within 20 days of service of a copy of the order herein with notice of entry, stipulates to reduce the verdict to $3,005,000, in which event the judgment is modified accordingly and as modified affirmed without costs. All findings of fact made by the trial justice which are inconsistent with the Memorandum herein are hereby reversed and new findings are made, pursuant to CPLR 5712(c) as contained in the Memorandum which is hereby made a part hereof.

Entered: June 7, 1991 CARL M. DARNALL, Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court of the City of Rochester, New York, this JUN 7 1991.*

(SEAL) CARL M. DARNALL
Clerk.

Memorandum Decision Entered
June 7, 1991

349. (Erie Co.)—FRANK ESCHBERGER, RESPONDENT, V CONSOLIDATED RAIL CORPORATION, APPELLANT.—Judgment unanimously reversed on the law and facts without costs and new trial granted on the issue of damages only unless plaintiff, within 20 days of service of a copy of the order herein with notice of entry, stipulates to reduce the verdict to $3,005,000, in which event the judgment is modified accordingly and as modified affirmed without costs. Memorandum: Plaintiff, a brakeman, injured his back while he was manually adjusting a misaligned drawbar on a railroad car at defendant's Frontier Yard. Plaintiff commenced this action seeking damages for personal injuries, alleging causes of action under the Federal Employees Liability Act (FELA, 45 USC §51 *et seq.*) and the Federal Safety Appliance Act (FSAA, 45 USC §2). Plaintiff's FELA claim was dismissed at the close of the proof. The jury awarded plaintiff damages under FSAA in the principal amount of $5,437,000.

On appeal, defendant argues that it is not liable under FSAA for plaintiff's injury, which was caused by his manual manipulation of a misaligned drawbar. We disagree. Most courts which have interpreted FSAA have concluded that the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad (*see,* Metcalfe v Atchison, Topeka & Santa Fe Railway, 491 F2d 892, 896 [10th Cir 1974] and cases cited therein). In similar situations in which railroad workers suffered injuries while adjusting a misaligned drawbar, most courts have found liability, and we reach the same result here (*see,* Leveck v Consolidated Rail Corp., 148 Ill App 3d 118,

appeal denied 113 Ill 2d 576; Plouffe v Burlington Northern, 224 Mont 467). Even if we were to recognize a misalignment defense to FSAA, as urged by defendant, we conclude that defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (*see,* Maldonado v Missouri Pacific Railway Co., 798 F2d 764, 770, *cert denied* 480 US 932).

Evidence concerning improper practices at defendant's yard was relevant to plaintiff's negligence claims under FELA and properly admitted. The court's instruction on the aggravation of a latent condition tracked PJI 2:283 and adequately defined that concept to the jury. We find no error in the court's determination to allow defendant to prove at a posttrial hearing the amount of setoff it might be entitled to for payment of plaintiff's medical expenses. The issue of setoff is one for the court, not the jury (*see,* CPLR 4545 [c]; McLaughlin, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4545, 1991 Supp. at 500). We further conclude that, by failing to object to comments made on summation by plaintiff's counsel at a time when the court might have taken corrective action, defendant has failed to preserve any issue concerning the propriety of the comments for review (*see,* Van Valkenburgh v Koehler, 164 AD2d 971). Moreover, were we to review the issue, we would hold that, although some of his remarks on summation were improper, the conduct of plaintiff's counsel was not so egregious as to require reversal.

Upon our review of the record, we conclude that the verdict is excessive, in that it deviates materially from what would be reasonable compensation (CPLR 5501 [c]). The highest amount that can be justified by plaintiff's

evidence is $853,000 for lost wages. We decline to disturb the amounts awarded for past and future medical expenses totaling $452,000. However, the jury's award of $4,000,000 for past and future pain and suffering cannot be sustained. Plaintiff has undergone two painful and serious surgical procedures on his back and faces the probability of further surgery. However, plaintiff is still able to walk, drive, and engage, in a limited fashion, in many of the activities he enjoys. In our view, the sum of $1,700,000 is the highest amount that can be justified as compensation for plaintiff's past and future pain and suffering. We, therefore, order a new trial on the issue of damages only, unless plaintiff stipulates to reduce the verdict to the principal amount of $3,005,000. (Appeal from Judgment of Supreme Court, Erie County, Flaghery, J. — Negligence.) PRESENT: CALLAHAN, *J.P.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

Order Denying Motion for Leave to Appeal to the Court of Appeals Entered October 4, 1991

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

Motion No. 349/91

PRESENT: CALLAHAN, *A.P.J.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

The above-named appellant having moved for reargument or in the alternative, leave to appeal to the Court of Appeals from the order of this Court entered June 7, 1991,

Now, upon reading and filing the affidavit of Richard F. Griffin sworn to July 24, 1991, the notice of motion with proof of service thereof, the opposing affidavit of William A. Quinlan sworn to August 27, 1991, and due deliberation having been had thereon,

It is hereby ORDERED That, the motion be, and the same hereby is, denied.

Entered: October 4, 1991 CARL M. DARNALL, Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court of the City of Rochester, New York, this 4th day of October, 1991.*

(SEAL)

CARL M. DARNALL
Clerk.

Order Denying Motion for Leave to Appeal to the Court of Appeals Dated December 23, 1991

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December, A. D. 1991.

PRESENT: HON. SOL WACHTLER, *Chief Judge presiding.*

4-13 Mo. No. 1264

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

State of New York
Court of Appeals

(SEAL)

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION December 23, 1991

4-13 Mo. No. 1264

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

Order Denying Defendant's Post-Trial Motions and Granting Plaintiff's Cross-Motion Dated June 8, 1990 and Granted September 4, 1990

At a Special Term of the Supreme Court held in and for the County of Erie at the Erie County Hall in the City of Buffalo, New York on June 8, 1990.

PRESENT: *HON. Thomas P. Flaherty, J.S.C.*
Justice Presiding

STATE OF NEW YORK
SUPREME COURT — COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Index No. H-53356

ORDER

Defendant Consolidated Rail Corporation having moved for a judgment setting aside the verdict of the jury or a new trial; and the plaintiff Frank J. Eschberger having cross-moved for an order to raise the ad damnum clause from four million dollars ($4,000,000) to five million four hundred thirty-seven dollars ($5,437,000), and the motions having come on regularly to be heard;

Now upon reading and filing the Notice of Motion of the defendant Consolidated Rail Corporation for a judgment setting aside the verdict or a new trial dated May 9, 1990, Post-trial motion for judgment or new trial, dated May 9, 1990, the Affidavit of Richard F. Griffin, sworn to on the 9th day of May, 1990, the Affidavit of Thomas R. Emmerling, CPA, sworn to on the 7th day of May, 1990, the Appendix to defendant's post trial motion dated May 9, 1990 and Supplemental Appendix to defendant's post-trial motion dated May 16, 1990, and the reply affidavit of Richard Griffin, sworn to on the 6th day of June, 1990, all in support of defendant's motion; the Affidavit in opposition of Paul W. Beltz, sworn to on the 23rd day of May, 1990; and

Upon reading and filing plaintiff's Cross-motion to raise the ad damnum clause dated May 23, 1990 and Affidavit of Paul W. Beltz, sworn to on the 24th day of May, 1990 with exhibits thereto attached in support of plaintiff's cross-motion and the affidavit of Richard F. Griffin, sworn to on the 6th day of June, 1990 with exhibits thereto attached, in opposition thereto; and

Now upon hearing MOOT & SPRAGUE (Richard F. Griffin, of counsel) in support of defendant's motion for judgment setting aside the verdict or a new trial and in opposition to plaintiff's cross-motion to raise the ad damnum clause; and PAUL WILLIAM BELTZ, P.C. (Paul W. Beltz, of counsel) in opposition to defendant's motion for judgment setting aside the verdict or a new trial and in support of plaintiff's cross-motion to raise the ad damnum clause, it is hereby

ORDERED that the defendant's motion for judgment to set aside the verdict or a new trial is hereby denied; and it is further

ORDERED that plaintiff's cross-motion to raise the ad damnum clause from $4,000,000 to $5,437,000 is hereby granted.

s/ THOMAS P. FLAHERTY
Justice of the Supreme Court

ENTER:
Granted
Sep. 4, 1990
s/ NANCY L. HART

Judgment Appealed From

STATE OF NEW YORK
SUPREME COURT – COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendants.

Index No. H-53356.

JUDGMENT AND BILL OF COSTS

The issues in the above-entitled action having duly come on for trial before HONORABLE THOMAS P. FLAHERTY, Justice of the Supreme Court, Erie County, and a jury in the Supreme Court, on April 2, 1990, and the parties having appeared in person and by their attorneys and the allegations and proofs of the parties having been heard; and the issues in said action having been duly submitted to the jury, and the jury having returned a verdict in favor of the plaintiff FRANK J. ESCHBERGER and against the defendant CONSOLIDATED RAIL CORPORATION in the sum of $5,437,000, and said verdict having been duly entered in the minutes of the court;

And the costs and disbursements of the plaintiff in said action having been duly taxed in the sum of $1,411.50; and

Interest thereon being taxed on the verdict from the date of April 26, 1990, to date, in the sum of $81,778.43 is hereby

ADJUDGED that the plaintiff FRANK J. ESCHBERGER of %%$ Fulton St. in Buffalo, N.Y. does recover of the defendant CONSOLIDATED RAIL CORPORATION OF 2929 Walden Avenue in Depew, N.Y. the sum of $5,437,000 together with interest thereon up to the present in the sum of $81,778.43; and it is further

ADJUDGED that the plaintiff FRANK J. ESCHBERGER does recover of the defendant CONSOLIDATED RAIL CORPORATION costs and disbursements as taxed herein in the sum of $1,411.40; and that plaintiff has execution therefor in the total sum to date of $5,520,189.93 against the defendant.

Judgment signed and filed this 27 day of June, 1990

s/ DAVID SWARTS
Erie County Clerk

Bill of Costs Annexed to Judgment

SUPREME COURT
COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

against

CONSOLIDATED RAIL CORPORATION,

Defendant.

Index No. H-53356.

COSTS OF PLAINTIFF

COSTS		DISBURSEMENTS	
Costs before note of issue CPLR 8201 subd. 1	$ 200.00	Fee for index number CPLR 8018 (a)	$
Costs after note of issue CPLR 8201 subd. 2	200.00	Referee's fees CPLR 8301 (a) 1	
Trial of issue CPLR 8201 subd. 3	300.00	Commissioner's compensation CPLR 8301 (a) 2	
Allowance by statute CPLR 8302 (a) (b)		Clerk's fee, filing notice of pend. or attach CPLR 8018 (e) 8021 (a) 12	
Additional allowance CPLR 8302 (d)		Clerk's fee cancel. notice of pend. CPLR 8021 (a) 12	
Motion costs CPLR 8202		Entering and docketing judgment CPLR 8301 (a) 7 8016 (a) 2	3.00
Appeal to App. Div. or App. Term before argument CPLR 8203 subd. 1		Paid for searches CPLR 8301 (a) 10	
Appeal to App. Div. or App. Term for argument CPLR 8203 subd. 2		Affidavits and acknowledgments CPLR 8009	
Appeal to Court of Appeals before argument CPLR 8204 subd. 1		Serving copy summons and complaint CPLR 8011 (c) 1 8301 (d)	12.00
Appeal to Court of Appeals for argument CPLR 8204 subd. 2		Note of issue CPLR 8020 (a)	120.00
Costs		Paid referee's report CPLR 8301 (a) 12	
COSTS	$ 700.00	Certified copies of papers CPLR 8301 (a) 4	
DISBURSEMENTS	711.50		
TOTAL	1,411.50		

Satisfaction piece CPLR 5020 (a) 8021	
Transcript and filing CPLR 8021	
Certified copy of judgment CPLR 8021	
Postage CPLR 8301 (a) 12	
Jury fee CPLR 8020 (c) 1	
Stenographer's fees CPLR 8002 8301	348.00
Sheriff's fees on execution CPLR 8011 (b) 8012	
Sheriff's fees on attachment, arrest, etc. CPLR 8011 (a) (c)2, 3(g)	
Paid printing cases CPLR 8301 (a) 6	
Paid printing case CPLR 8301 (a) 6	
Clerk's fees Court of Appeals CPLR 8301 (a) 12	
Paid copies of papers CPLR 8016 (a) 4	
Motion expenses CPLR 8301 (b)	
Fees for publication CPLR 8301 (a) 3	
Serving subpoena CPLR 8011 (c) 1 8301 (d)	228.50
Paid for Register's Search CPLR 8301 (a) 10	
Paid for County Clerk's Search	
Paid for Loan Commissioner's Search	
Paid for U.S. District Court Search	
Paid for U.S. Circuit Court Search	
Paid for Tax Search	
Paid for Referee's Report	
Attendance of following Witnesses: CPLR 8001 (a) (b) (c) 8301 (a) 1	

ATTORNEY'S AFFIRMATION } SS.
STATE OF NEW YORK, COUNTY OF ERIE }

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that he is Paul W. Beltz, the attorney(s) of record for the plaintiff in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses, attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: June 25, 1990

s/ PAUL W. BELTZ

The name signed must be printed beneath

Paul W. Beltz, Esq.
PAUL WILLIAM BELTZ, P.C.

EXHIBIT 13

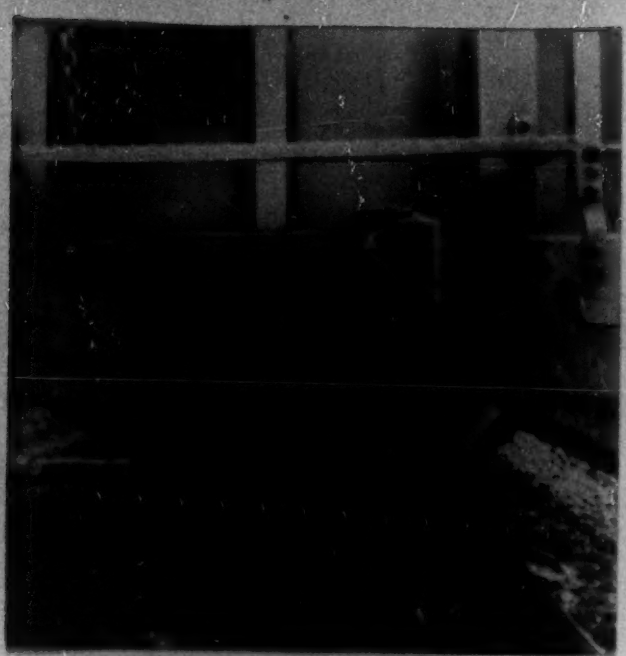

EXHIBIT 8

Federal Register, Vol. 48, No. 193,
October 4, 1983—Proposed Rules,
Pages 45272-45274

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[FRA Docket No. RSOR—7, Notice 1]

Protection of Employees During Hump Operations

AGENCY: Federal Railroad Administration (FRA), Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to require that railroads establish procedures under which train and yard crews performing certain functions on hump yard tracks would be protected from possible injury or death as the result of unanticipated movement of the rolling equipment on which they are working. This action is being proposed in response to a joint request from the Association of American Railroads (AAR) and the United Transportation Union (UTU) that FRA establish uniform procedures for the protection of workmen in such facilities.

DATES: Written comments must be received not later than November 18, 1983. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

ADDRESS: Written comments should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, D.C. 20590. Persons desiring to be notified that their written comments have been received by FRA shall submit a stamped, self-

addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for comments, during regular business hours in Room 7321A of the Nassif Building at the above address.

FOR FURTHER INFORMATION CONTACT: Bruce Fine, Director, Office of Safety Analysis, FRA, Washington, D.C. 20590. Telephone: 202-426-4345.

SUPPLEMENTARY INFORMATION:

Background

Railroads assemble, disassemble, and reassemble freight trains in approximately 4000 classification yards in the contiguous 48 states. In approximately 125 such yards, railroads employ a gravity feed system to assist in the classification of freight care for movement to destination. These are known as "hump yards." Although the configuration of hump yards varies considerably depending on location and yard capacity, their essential feature is a single track at the apex of a hill that branches into multiple tracks on one downward side of the hill.

Freight cars are shoved by a locomotive to the apex of the hill in long strings, uncoupled singly or in groups, and allowed to roll freely into the multiple tracts on the downward slope. Mechanical devices known as retarders are used to limit the speed at which the cars move down the hill. Routing of a car or group of cars to a particular track is accomplished by aligning the appropriate switches to direct the movement to the desired track. The group of tracks on the downside of the hill is commonly referred to as the bowl tracks of the yard.

When a freight car reaches the apex of the hill, i.e., the hump, the car is uncoupled manually. The individual in charge of the hump then activates a control panel to establish the routing for that car and to determine the amount of brake force to be applied by the retarder for controlling the speed and distance the car will be allowed to travel on the bowl tracks. After a group of cars has been allowed to enter a given bowl track, a yard crew, using a locomotive, couples the cars and connects the airhoses between them in order that they can be moved as a single unit. In performing these tasks, members of the yard crew must position themselves between the cars in such a manner that unanticipated movement of the cars poses a significant risk of injury.

Movement of the cars in the bowl results from use of the yard locomotive or from the impact of other cars entering the track from the hump. The risk of injury to members of the yard crew from unanticipated movement of the locomotive is remote since the person operating the locomotive is aware of their actions, of the risks associated with unanticipated movement, and of the need to be guided by the instructions of the exposed yard crew concerning when the cars can be moved safely. It is therefore, the risk to the yard crew from unanticipated movement caused by the impact of another car arriving from the hump the FRA is addressing in this NPRM.

Current Practices

Recent FRA field investigation disclosed that, because of reduced traffic levels, not all existing hump yards are currently in operation. At those locations presently in service, the existing procedures for avoiding the risk of unanticipated movement cause by the arrival of additional cars varies among the railroads and even

among similar facilities operated by a single railroad. Of the 91 hump yards currently operating, there are 9 facilities where no protection is provided, 17 facilities where less than positive protection is provided, and 65 facilities where positive protection is provided. At the facilities providing positive protection the method for providing protection varies from informal communication between the yard crew and the operator of the hump to positive locking out of switches that provide access to the track being worked.

Accident Data

FRA has identified seven fatalities that occurred in bowl tracks during the eight years between 1975 and 1982. In each of these accidents, FRA conducted a field investigation to determine the cause of the employee's death. Three of these accidents directly involved the issue addressed by the NPRM, and in two other instances the level of protection being afforded yard crews was relevant. In the remaining instances the fact that the employees were performing tasks in the hump yard is unrelated to the circumstances addressed in this NPRM.

FRA data concerning injuries to yard and train crews does not include the type of facility where the injuries occur; consequently, FRA cannot identify those incidents that occurred in hump yards. Within the board category of on-the-job injuries to yard crews performing similar tasks, FRA has identified more than 5,000 reportable injuries that occurred during the calendar years 1978 through 1982. FRA believes that some of these incidents occurred in bowl tracks and could have been prevented by adherence to the procedures being proposed in this NPRM. FRA's belief is buttressed by the shared concern

of rail labor and rail management expressed in their suggestion that FRA adopt regulations seeking to reduce the potential for injury in hump yards. However, to assist in further analysis of the accident data, FRA requests that commenters furnish any specific information at their disposal concerning the number of injuries to yard crews that can be attributed to the hazard addressed in this NPRM.

Section-by-Section Analysis

Section 218.39

This section would require that any railroad operating a hump yard adopt a specific rule that will mandate a minimum level of positive protection for employees. This operating rule could be incorporated in the existing Uniform Code of Operating Rules, the AAR Standard Code of Operating Rules, or an individual railroad's book of rules, general orders, timetable special instructions, or other similar documents.

FRA proposes that, in accordance with the joint recommendation of AAR/UTU, employees to be given protection are the train and engine service employees. Depending on local nomenclature, this would encompass individuals referred to as brakemen, switchmen, yardmen, conductors, yard crews, road crews, and footboard yardmasters, all of whom normally constitute train and engine service employees covered under the Hours of Service Act [45 U.S.C. 62; 49 CFR Part 228]. The railroads could extend coverage of their operating rules beyond these employees, but it is essential that train and engine service employees be provided full protection under each carrier's rule.

The operating rule would require that covered employees be provided protection when engaged in coupling air hoses or adjusting coupling devices, which activities demand that they place themselves between rolling equipment. This rule would apply to components of these two general tasks, *e.g.*, replacement of airhose gaskets, turning angle cocks, and adjusting drawbars.

To provide protection, the hump operator, or similar person, would be required to activate a remotely controlled switch located near the apex of the hump, causing the switch to be aligned against movement to the affected track, and to apply a locking or blocking device to the control to prevent inadvertent use of the control mechanism. It should be noted that only this single switch must be activated to provide protection. The railroads could frame their operating rules so as to account for individual circumstances, provided only that the rule contains these essential elements. For example, computer systems could be used to provide the locking or blocking function. Each railroad would have the discretion to adopt any additional protective measures it deems appropriate.

To ensure effective protection, this regulation would, as AAR and UTU jointly recommended, require that the employees personally contact the operator of the remotely controlled switch, both to obtain protection and to permit removal of the protection. This individualized communication is necessary to preclude erroneous or inadvertent loss of protection. Although FRA is not proposing to require the use of any written log of notification for protection or removal of protection, the use of such systems would not be precluded by this proposal.

Section 218.41

This section would provide for the imposition of civil penalty sanctions for a railroad's failure to issue a rule as required by the regulation or to comply with its operating rule.

Appendix A

Appendix A to this part currently contains a detailed schedule of civil penalties setting forth FRA policy for assessment of particular monetary amounts in the event of violations. This schedule will be revised at the time an amendment based on this proposal is adopted.

Regulatory Impact

This NPRM has been evaluated in accordance with existing regulatory policies and it would be neither a "major" rule as defined under Executive Order 12291 nor a "significant" rule as defined under DOT regulatory policies and procedures. The rule would have a direct impact only on the thirty railroads that operate hump yards. To the degree that individual railroads within that group already have an analogous procedure, the rule will have virtually no economic impact. Although FRA is constrained in its analysis by the absence of well-defined economic and accident data, FRA has concluded that the rule will involve only minimal costs for the railroads and should have a positive economic impact through reduced accident costs. Because the economic impact of the regulation, as proposed, is expected to minimal, FRA has determined that further evaluation is not necessary at this time.

FRA requests that commenters provide information on the question of the economic impact of this regulation. FRA will analyze this data in determining whether to issue a final rule in this proceeding.

Since only railroads of considerable size operate hump yards, this rule would have no adverse impact on small entities. Based on the facts set forth in this NPRM, it is certified that the rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act (5 U.S.C. §601 *et seq.*). The NPRM does not constitute a significant rule under the DOT regulatory policies and procedures.

Paperwork Reduction Act

There are information collection requirements indirectly contained in this NPRM and these will be submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. No. 96-511). Until OMB approval is obtained for the information collection requirements, these provisions will not be effective. FRA specifically solicits comments on the potential paperwork burden imposed by the proposed regulations. The information collection requirements associated with this proposed rule stem from the provisions of §§217.7 and 217.9 of a related regulation. That regulation [49 CFR Part 217] requires all railroads to conduct periodic operational test to determine compliance with their rules and to provide the results of that testing together with a copy of their rules to FRA. The increase in the existing information collection requirements associated with adoption of this proposed rule have been submitted to OMB for review.

Public comments on the issue of information collection requirements should be directed both to FRA, in the manner provided for elsewhere in this notice, and to OMB. Communications to OMB should be submitted to Mr. Gary Waxman, Room 30001, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

Environmental Impact

On June 16, 1980, FRA published (45 FR 40854) revised procedures for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive orders, and DOT Order 5610.1C.

These FRA procedures require that an "environmental assessment" be performed prior to all major FRA actions. The procedures categorically exempt certain actions from the requirements for an environmental assessment because they are not major actions.

The FRA environmental procedures also contain a provision that enumerates seven criteria which, if met, demonstrate that a non-categorically exempt action is not a "major" action for environmental purposes. These criteria involve diverse factors, including the availability of adequate relocation housing; the possible inconsistency of the action with Federal, State or local law; the possible adverse impact on natural, cultural, recreational, or scenic environments; the use of properties covered by section 4(f) of the DOT Act; and the possible increase in traffic congestion. This proposed rule meets the seven criteria that establish an action as a non-major action.

Public Participation

Interested persons are invited to participate in this proceeding by submitting written data, views, or comments. Communications should identify the regulatory docket number and notice number and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel Federal Railroad Administration, 400 Seventh Street SW., Washington, D.C. 20590. Persons

desiring that receipt of their communications be acknowledged should attach a stamped, pre-addressed postcard to the first page of their communication. Communications received before November 18, 1983, will be considered before final action is taken on the proposed rule. All comments received will be available for examination by interested persons at any time during regular business hours in Room 7321A, Nassif Building, 400 Seventh Street S.W., Washington, D.C. 20590.

FRA has not scheduled a public hearing on this proposal since the facts do not warrant it. However, if requested by interested parties to provide an opportunity for oral comment, FRA will provide for a public hearing.

List of Subjects in 49 CFR Part 218

Railroad safety.

In consideration of the foregoing, FRA proposes to amend Part 218, Title 49, Code of Federal Regulations, as set forth below:

The Proposed Rule

1. 49 CFR Part 218 is amended by adding a new §218.39, to read as follows:

§218.39 Hump Operations.

After January 1, 1984, each railroad that operates a hump yard facility must have in effect an operating rule that substantively adopts the following provisions:

(a) When a train or engine service employee is required to couple an air hose or to adjust a coupling device and that activity will require that the employee place himself between pieces of rolling equipment located on a bowl track, the operator of any remotely controlled

switch that provides access from the apex of the hump to the track on which the rolling equipment is located shall be notified.

(b) Upon such notification, the operator of such remotely controlled switch shall line it against movement to the affected bowl track and shall apply a locking or blocking device to the control for that switch; and

(c) The operator shall then notify the employee that the requested protection has been provided and shall remove the locking or blocking device only after being notified by the employee that protection is no longer required on that track.

2. 49 CFR Part 218 is amended by adding a new §218.41, to read as follows:

§218.41 Prohibited acts.

A railroad is subject to a penalty, as provided in Appendix A, of this part, if it (a) fails to issue an operating rule as required by section 218.39 of this part or (b) fails to comply with its operating rule issued pursuant to section 218.39 of this part.

[Sec. 202, 84 Stat. 971 (45 U.S.C. §431); sec. 1.49(m) of the Regulations of the Secretary of Transportation (49 CFR 1.49(m)]

Issued in Washington, D.C., September 15, 1983.

Thomas A. Till,

Acting Administrator.

[FR Doc. 83—26732. Filed 10-3-83; 8:45 am]

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**Federal Register, Vol. 49, No. 36,
February 22, 1984—Rules and Regulations,
Pages 6495-6497**

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[FRA Docket No. RSOR-7, Notice 2]

Protection of Employees During Hump Operations

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This document amends FRA's Railroad Operating Rules to require that railroads establish procedures under which train and yard crews performing certain functions on hump yard tracks will be protected from injury as the result of unanticipated movement of the rolling equipment on which they are working. This action responds to a joint request from the Association of American Railroads (AAR) and the United Transportation Union (UTU) that FRA establish uniform procedures for the protection of workmen in such facilities.

EFFECTIVE DATE: March 23, 1984.

FOR FURTHER INFORMATION CONTACT: Bruce Fine, Director, Office of Safety Analysis, FRA, Washington, D.C. 20590. Telephone: 202—472—4770.

SUPPLEMENTARY INFORMATION:

Background

Railroads assemble, disassemble, and reassemble freight trains in approximately 4,000 classification yards in the continuous 48 states. In approximately 125 such yards, railroads employ a gravity feed system to assist in the classification of freight cars for movement to destination. These are known as "hump yards." Although the configuration of hump yards varies considerably depending on location and yard capacity, their essential feature is a single track at the apex of a hill that branches into multiple tracks on one downward side of the hill.

Freight cars are shoved by a locomotive to the apex of the hill in long strings, uncoupled singly or in groups, and allowed to roll freely into the multiple tracks on the downward slope. Mechanical devices known as retarders are used to limit the speed at which the cars move down the hill. Routing of a car or group of cars to a particular track is accomplished by aligning the appropriate switches to direct the movement to the desired track. The group of tracks on the downside of the hill is commonly referred to as the bowl tracks of the yard.

When a freight car reaches the apex of the hill, *i.e.*, the hump, the car is uncoupled manually. The individual in charge of the hump then activates a control panel to establish the routing for that car and to determine the amount of brake force to be applied by the retarder for controlling the speed and distance the car will be allowed to travel on the bowl tracks. After a group of cars has been allowed to enter a given bowl track, a yard crew, using a locomotive, couples the cars and connects the airhoses between them in order that they can be moved

as a single unit. In performing these tasks, members of the yard crew must position themselves between the cars in such a manner that unanticipated movement of the cars poses a significant risk of injury.

Movement of cars in the bowl results from use of a yard locomotive or from the impact of other cars entering the track from the hump. The risk of injury to members of the yard crew from unanticipated movement of the locomotive is remote since the person operating the locomotive is aware of their actions, of the risks associated with unanticipated movement, and of the need to be guided by the instructions of the exposed yard crew concerning when the cars can be moved safely. It is, therefore, the risk to the yard crew from unanticipated movement caused by the impact of another car arising from the hump that FRA is addressing in this rule.

In response to a joint recommendation from the AAR and the UTU, FRA published a proposed rule to address this problem on October 4, 1983 (49 FR 45272). All eight commenters responding to that notice urged adoption of the proposed rule.

Three of the commenters suggested that FRA expand the coverage of the proposed rule as to both the type of facilities and the type of employees. FRA has decided not to implement these suggestions in adopting this final rule. To expand the application of this rule beyond hump yards would significantly alter the nature of the AAR/UTU recommendation and the impact of the rule. The AAR/UTU recommendation and the FRA's proposed rule would apply to fewer than 125 locations, whereas the suggested expansion of this rule to include all yard facilities would bring some 4,000 yards within its scope. Such broadened applicability would be beyond the scope

of the notice of FRA's proposal and is not warranted either by the nature of the hazard presented in non-hump yard operations or by the available accident statistics. Nor has FRA adopted the suggestion for expanding the type of employees who are to be provided improved protection at hump yards. Those not covered by this final rule already receive adequate protection under a different set of regulatory provisions.

Several commenters suggested that FRA clarify the applicability of the proposed rule. The first area of clarification sought by these commenters involves the use of hump yards that either lack a remote control capability or, having it, are being operated without its use. Since FRA can identify only a handful of hump yards that lack remote control capability, FRA does not intend to bring operations at those facilities within the scope of this regulation. In those instances where a hump yard is capable of being remotely controlled but is functioning in a manual mode, the facility is normally underutilized or experiencing technical problems with its remote control devices. Compliance with this regulation does not appear to be warranted in either instance. FRA has added the words "remotely controlled" as a description in the regulatory language to indicate that the rule does not apply to manual humps or to remotely controlled humps that are functioning in a manual mode.

One commenter expressed concern over its ability to comply with the regulation at a single facility where routing functions for switches are computer controlled. The commenter indicated that a specially designed wedge would be inserted to prevent computer override of the desired alignment of the switch at that facility. The insertion of that wedge would be performed at the direction of the remote control operator. FRA believes

that the insertion of this wedge would provide the appropriate level of protection and that alteration of the proposed rule language to specifically sanction that practice is not necessary.

The remaining comments sought clarification of FRA intent in adopting this rule so as to address possible compliance issues. One commenter sought assurance that humping operations on a particular track can be resumed if the employees working on that track have completed their initial tasks. Such intermittent humping is permissible if the employees have been appropriately notified and are again provided with protection before they resume the tasks that expose them to risk. In a similar vein, a commenter noted that normal switching operations, when the hump is not in service, would not expose the switch crew to danger of unanticipated movement caused by the arrival of cars from the hump and that compliance with the regulation should not be necessary for those switching moves. FRA agrees with that commenter's interpretation since the rule is intended to protect employees only from hump operations.

The final comment concerning FRA's intent involved the details of the notification procedure. According to the commenter, there are a number of facilities where the yardmaster or hump supervisor would be the person contacted by the crewmembers. This person would then instruct an individual at the control machine to apply the blocking or locking device. This relay system is used since the person at the control machine does not have immediate access to the appropriate communication equipment for contacting crewmembers. The commenter sought assurance that the use of the yardmaster or hump supervisor to bridge the personal communication

gap between the crewmember and the control operator was permissible. FRA's regulatory language does not preclude that practice and FRA believes that such a practice should result in reliable notification procedures.

Regulatory Impact

This final rule has been evaluated in accordance with existing regulatory policies. It is neither a "major" rule as defined under Executive Order 12291 nor a "significant" rule as defined under DOT regulatory policies and procedures (44 FR 11034). The rule will have a direct impact only on the thirty railroads that operate hump yards. To the degree that individual railroads within that group already have an analogous procedure, the rule will have virtually no economic impact. Although FRA is constrained in its analysis by the absence of well-defined economic and accident data, FRA has concluded that the rule will involve only minimal costs for the railroads and should have a positive economic impact through reduced accident costs. Although FRA specifically requested information on the economic impact of this regulation, none of the commenters addressed this issue. Since FRA originally concluded that the economic impact is expected to be minimal and has received no information to the contrary, FRA has determined that further evaluation is not necessary.

Since only railroads of considerable size operate hump yards, this rule will have no adverse impact on small entities. Based on the facts set forth in this final rule, it is certified that the rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

There are information collection requirements indirectly contained in this final rule and these have been submitted to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511). Although FRA specifically solicited comments on the potential paperwork burden imposed by the proposed regulations, no comments on this issue were received. The indirect information collection requirements associated with this proposed rule stem from the provisions of §§217.7 and 217.9 of a related regulation. That regulation (49 CFR Part 217) requires all railroads to conduct periodic operational tests to determine compliance with their rules and to provide the results of that testing together with a copy of their rules to FRA. The increase in the existing information collection requirements associated with adoption of this proposed rule has been approved by OMB (OMB Approval No. 2130-0035).

Environmental Impact

On June 16, 1980, FRA published (45 FR 40854) revised procedures for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and DOT Order 5610.1C.

These FRA procedures require that an "environmental assessment" be performed prior to all major FRA actions. The procedures categorically exempt certain actions from the requirements for an environmental assessment because they are not major actions.

The FRA environmental procedures also contain a provision that enumerates seven criteria, which, if met, demonstrate that a non-categorically exempt action is not a "major" action for environmental purposes. These criteria involve diverse factors, including the availability of adequate relocation housing; the possible inconsistency of the action with Federal, State or local law; the possible adverse impact on natural, cultural, recreational, or scenic environments; the use of properties covered by section 4(f) of the DOT Act; and the possible increase in traffic congestion. This proposed rule meets the seven criteria that establish an action as a non-major action.

List of Subjects in 49 CFR Part 218

Occupational safety and health. Penalties. Railroad employees. Railroads.

PART 218—[AMENDED]

In consideration of the foregoing, FRA is amending Part 218, Title 49, Code of Federal Regulations, as set forth below:

1. 49 CFR Part 218 is amended by adding a new §218.39, to read as follows:

§218.39 Hump operations.

After June 30, 1984, each railroad that operates a remote control hump yard facility must have in effect an operating rule that adopts the following provisions in substance:

(a) when a train or engine service employee is required to couple an air hose or to adjust a coupling device and that activity will require that the employee place himself

between pieces of rolling equipment located on a bowl track, the operator of any remotely controlled switch that provides access from the apex of the hump to the track on which the rolling equipment is located shall be notified;

(b) upon such notification, the operator of such remotely controlled switch shall line it against movement to the affected bowl track and shall apply a locking or blocking device to the control for that switch; and

(c) the operator shall then notify the employee that the requested protection has been provided and shall remove the locking or blocking device only after being notified by the employee that protection is no longer required on that track.

2. 49 CFR Part 218 is amended by adding a new §218.41, to read as follows:

§218.41 Prohibited acts.

A railroad is subject to a penalty, as provided in Appendix A of this part, if it (a) fails to issue an operating rule as required by §218.39 of this part or (b) fails to comply with its operating rule issued pursuant to §218.39 of this part.

3. 49 CFR Part 218 is amended by revising Appendix A to read as follows:

APPENDIX A—SCHEDULE OF CIVIL PENALTIES

Section		Violation	Intentional violation[1]
218.23	Blue signal display	$750	$2,000
218.25	Workmen on main track	750	2,000
218.27	Workmen on other than main track	750	2,000
216.19	Alternate methods of protection	750	2,000
218.30	Remotely controlled switches (a) and (b)	750	2,000
	(c)	500	1,000
218.41	Prohibited acts:		
	(a) No rule adopted	500	2,000
	(b) Rule compliance	750	2,000

[Sec. 202.84 Stat. 971 [45 U.S.C. 431]; sec. 1.49(m) of the Regulations of the Secretary of Transportation (49 CFR 1.49(m))]

Issued in Washington, D.C. on February 14, 1984.

John H. Riley,

Administrator.

[FR Doc. 84-4403 Filed 2-21-84, 8:45 am]

BILLING CODE 4910—06—M

[1] For the purposes of this schedule, an intentional violation is the knowing and willful failure of a carrier, its officers or agent to comply with the provisions of this part. The Administrator reserves the authority to assess the maximum penalty of $2,500 for a violation of any section contained in Part 218.

Conrail Safety Rule 1711

1711. Before fouling, going between or underSTANDING equipment for inspection, adjustment, repairs or any other purpose:

(a) Arrangements for protection must be originated and terminated only by the employee who fouls, goes between or under the equipment.

(b) Have a thorough understanding with other employees involved so that no signals to move will be given.

(c) Make sure that protection has been provided against any approaching equipment on the same track.

(d) If a locomotive is attached, give a hand stop signal to the engineer and wait for his audible or visible acknowledgment by hand signal or one long sound of the locomotive whistle or horn.

(e) Be sure that the slack has adjusted.

(f) Equipment must be separated by a distance of at least 30 feet before any drawbar, knuckle, hose, or other between equipment adjustment is made.

(g) Foot must not be used to make adjustment.

(h) Stand to the side of instead of in front of cushioned underframe coupler.

(i) Know that the equipment will not move.

(j) If necessary to go under car, keep all parts of body at least 4 feet from wheels when crossing the rail.